(18)

No. 92-94

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LARRY ZOBREST, *et al.*,

Petitioners,

—v.—

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, ARIZONA CIVIL LIBERTIES UNION, AMERICAN JEWISH COMMITTEE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AND ANTI-DEFAMATION LEAGUE, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights, including the Religion Clauses. The ACLU has been direct counsel in this Court's most recent Establishment Clause case, *Lee v. Weisman*, __ U.S. __, 112 S.Ct. 2649 (1992), and its most recent Free Exercise Clause case, *Church of Lukumi Babalu Aye v. City of Hialeah*, No. 91-948 (argued Nov. 4, 1992). The Arizona Civil Liberties Union is a statewide affiliate of the ACLU.

The American Jewish Committee (AJC), a national organization founded in 1906, is dedicated to the defense of the religious rights and freedoms of all Americans. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty and has proved of inestimable value to the free exercise of religion in our pluralistic society. In support of this vital principle, AJC through the years has filed numerous briefs in this Court. We do so again in the conviction that the Establishment Clause bars government funding of sectarian school instruction in any way, shape or form.

Americans United for Separation of Church and State is a national nonprofit, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Americans United is composed of some 50,000 members nationwide and maintains active chapters in several states. Americans United members adhere to various religious faiths with some holding no religious affiliation. They are united, however, in their

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

commitment to the long-standing American principle of church and state separation. Since its founding in 1947, Americans United has participated either as a party or as *amicus* in many of the leading church and state cases decided by this Court, including several of the cases that serve as the basis for the decisions below.

The Anti-Defamation League (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion. In support of this principle, ADL has previously filed *amicus* briefs in such cases as *Lee v. Weisman*, __ U.S. __, 112 S.Ct. 2649 (1992); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986); *Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and *Abington v. Schempp*, 374 U.S. 203 (1963). ADL is able to bring to the issues raised in this case the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

SUMMARY OF ARGUMENT

The provision of a sign language interpreter by the state in a sectarian school would violate the most fundamental principles underlying this Court's Establishment Clause decisions because it would entail the expenditure of tax dollars and the participation of a state employee to assist directly in the teaching and propagation of religious beliefs. While the Court has permitted states to provide certain types of secular aid to students who attend sectarian schools, provided that the aid is not actually used to assist in any religious aspect of the school's program, it has repeatedly invalidated state aid that

would or might be used to assist in the communication of religious beliefs or ideas. Thus, the Court has never permitted state employees to participate in the communication of religious instruction, and has refused to permit state employees to engage in activities on the premises of a sectarian school where the activities carried any significant risk that the employees would participate in communicating religious beliefs or ideas. These precedents compel the conclusion that the Establishment Clause prohibits a state from providing a state-paid sign language interpreter to a deaf child attending a sectarian school, where it is undisputed that the state employee would participate directly in the communication of the child's pervasively religious education.[2]

This Court's decisions in *Mueller v. Allen*, 463 U.S. 388 (1983), and *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), do not compel a different result. Specifically, those decisions do not stand for the broad proposition suggested by petitioners -- namely, that the state's decision to funnel its aid through individual parents or students, rather than directly to a sectarian school, immunizes the aid from Establishment Clause scrutiny. Moreover, provision of a sign language interpreter in a pervasively sectarian secondary school is constitutionally different, both in form and substance, from the benefits addressed in *Mueller*

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[2] In holding that the provision of a sign language interpreter by the state would violate the Establishment Clause, the court of appeals relied primarily on its conclusion that "[the] presence and function of an employee paid by the government in sectarian classes would create [a] 'symbolic union' [between government and religion] . . . [and] create the appearance that it was a 'joint sponsor' of the school's activities." *Zobrest v. Catalina Foothills School District*, 963 F.2d 1190, 1194-95 (9th Cir. 1992). While agreeing with this conclusion, *amici* submit that the provision of a sign language interpreter in a sectarian school violates the Establishment Clause in an even more fundamental way, because it amounts to actual assistance by the state in the teaching and propagation of religious beliefs.

and *Witters*. The provision of a sign language interpreter, unlike the granting of either tax deductions to parents or cash assistance to a college student, and also unlike the provision of a mechanical hearing aid, would entail the actual participation of a state employee paid directly out of tax dollars in the teaching and propagation of religious beliefs; it would create a "symbolic union" between the state and religion and thereby convey a message of endorsement of religious education; and, because of the integral role a sign language interpreter plays in a deaf student's religious education, it would involve excessive entanglement by the state with religion.

Finally, contrary to the claim advanced by petitioners' and their supporting *amici*, the refusal to provide a state-paid sign language interpreter in a sectarian school does not burden petitioners' free exercise rights or "discriminate" against religion. This Court has never held that free exercise rights are burdened by a state's refusal to provide affirmative assistance to an individual's or institution's pursuit of religious activities, even if similar assistance is provided to nonsectarian activities. This Court's decisions have held only that a state may not deny certain generally available benefits unrelated to religious activities (such as unemployment compensation) to an individual based upon that individual's religious beliefs or practices. Here, petitioners seek to have the state provide the means by which James Zobrest's religious education will be communicated to him. That is a benefit that is not generally available to individuals, including deaf children, who do not choose to attend a sectarian school. The Free Exercise Clause does not require the state to provide such special benefits to religion and the Establishment Clause expressly forbids it. Thus, the two Religion Clauses can and should be read harmoniously to deny the relief petitioners seek in this case.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE PROHIBITS A STATE FROM PROVIDING A STATE-EMPLOYED SIGN LANGUAGE INTERPRETER TO COMMUNICATE A DEAF CHILD'S PERVASIVELY RELIGIOUS EDUCATION

A. The State May Not Expend Tax Money Or Otherwise Provide Assistance To The Propagation Of Religious Beliefs Or Teaching

This Court has repeatedly and consistently held that a state may not expend tax money or otherwise provide any assistance whatsoever to the teaching or propagation of religious beliefs. In *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), Justice Black wrote that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions . . . whatever form they may adopt to teach or practice religion." In *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971), Chief Justice Burger held that "[u]nder our system the choice has been made that government is to be entirely excluded from the area of religious instruction . . . ." In *Bowen v. Kendrick*, 487 U.S. 589 (1988), Justice Rehnquist reiterated Justice Brennan's admonition that the Establishment Clause "'prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith'" and, for that reason, the Court has "struck down programs that entail an unacceptable risk that government funding would be used to 'advance the religious mission' of the religious institution receiving aid." *Id.* at 611-12, *quoting Grand Rapids School District v. Ball*, 473 U.S. 373, 385 (1985). Most recently, in *Lee v. Weisman*, ___ U.S. ___, 112 S.Ct. 2649 (1992), Justice Kennedy wrote that "[t]he design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere," and emphasized that, "at a minimum, the Constitution guarantees that government may

not coerce anyone to support or participate in religion or its exercise . . . ." *Id.* at 2656.[3]

Consistent with this broadly shared and long held view, the Court has upheld aid to sectarian elementary and secondary schools only upon finding that the aid would not be used in any manner to teach or otherwise inculcate religious beliefs or ideas. For example, in *Everson*, the Court held that the payment of bus fares of parochial school pupils, like the provision of police and fire protection, survived Establishment Clause scrutiny because it was "so separate and so indisputably marked off from the religious function [of the schools]." 330 U.S. at 18.

Similarly, in *Wolman v. Walter*, 433 U.S. 229 (1977), the Court approved the provision of diagnostic services to parochial school students because the services "have little or no educational content and are not closely associated with the educational mission of the nonpublic school," *id.* at 244, and approved therapeutic services provided on public property because there was no danger in that setting that a state-paid therapist would participate in communicating religious beliefs or ideas. *Id.* at 247. And, in *Mueller v. Allen*, 463 U.S. 388, the Court upheld tax deductions for expenses incurred by parents in sending their children to sectarian schools only after emphasizing that "state officials must disallow deductions taken for 'instructional books and materials used in the

[3] *Amici* Christian Legal Society, *et al.*, attack what they characterize as the "religious uses" approach to the Establishment Clause because "[its] underlying theory is that taxpayers may not be compelled to support religious activity." Brief of Christian Legal Society at 15. *Amici* simply ignore the long and unbroken line of decisions in which this Court has correctly held that the purpose of the Establishment Clause was to fulfill the framers' "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions . . . ." *Everson*, 330 U.S. at 11.

teaching of religious tenets, doctrines or worship . . . .'" *Id.* at 403.[4]

On the other hand, where the Court has found either that state aid would be used to assist in the teaching of religion or that there was even a significant *risk* that it would be so used, the Court has consistently held that the aid was prohibited by the Establishment Clause. For example, in *Lemon*, the Rhode Island and Pennsylvania programs to supplement the salaries of teachers in parochial schools both contained strict prohibitions against the teachers participating in religious education at the schools. 403 U.S. at 608, 610. The Court nevertheless held that, due to the pervasively sectarian nature of the parochial schools, "the *potential* for impermissible fostering of religion is present," and the programs were therefore unconstitutional. *Id.* at 615-22. In *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the Court held that state grants for maintenance and repair of parochial school buildings were unconstitutional because "[n]othing in the statute . . . bars a qualifying school from paying out of state funds the salaries of employees who maintain the school

[4] *See also Board of Education v. Mergens*, 496 U.S. 226, 253 (1990) (statute prohibited faculty or school officials from participating in noncurricular religious meetings held on secondary school premises pursuant to Equal Access Act); *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 659 (1980)(private schools may be reimbursed for administering state-required tests if there are "effective means for insuring" that the payments will "cover only secular services"); *Roemer v. Board of Public Works*, 426 U.S. 736, 760 (1976) (grants to private colleges not to be used for "'sectarian purposes'"); *Hunt v. McNair*, 413 U.S. 734, 744-45 (1973)(lease agreements financed by state grants to church-affiliated colleges "must contain clause forbidding religious use"); *Tilton v. Richardson*, 403 U.S. 672, 681 (1971)(any federally subsidized facilities in sectarian institutions must "expressly prohibit their use for religious instruction, training, or worship"); *Board of Education v. Allen*, 392 U.S. 236, 248 (1968) (holding that state can provide sectarian schools with secular textbooks that are not "instrumental in the teaching of religion").

chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities." *Id.* at 774. Similarly, because there was no "effective means for guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes," the provision of financial assistance to sectarian schools through tuition grants was prohibited. *Id.* at 780-83.

In *Meek v. Pittenger*, 421 U.S. 349 (1975), Justice Stewart held that states may provide church-related schools only "secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school." *Id.* at 364. The Court, therefore, invalidated state funding of teachers for remedial and exceptional students in sectarian schools. As Justice Stewart explained: "The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." *Id.* at 370-71, *quoting Lemon*, 403 U.S. at 619. The Court in *Wolman* invalidated the state's funding of field trips by students at sectarian schools because of the "unacceptable risk" that the trips would be used in furtherance of the schools' religious mission. 433 U.S. at 250-51. Similarly, in *Grand Rapids School District v. Ball*, 402 U.S. 373, and *Aguilar v. Felton*, 473 U.S. 402 (1985), the Court held that the Establishment Clause prohibits the use of publicly funded teachers to provide secular classes in sectarian schools because the teachers "may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs." *Grand Rapids*, 473 U.S. at 385; *Aguilar*, 473 U.S. at 408-09.

Here, it is undisputed that a sign language interpreter provided by the School District at Salpointe Catholic High School would participate in the communication of religious tenets and beliefs. The sign language interpreter would be James's principal means of communicating with his teachers and fellow students at Salpointe, and his teachers' and fellow students' principal means of

communicating with him. The Stipulation of Facts demonstrates the extent to which this communication would amount to the teaching, inculcation and propagation of religious ideas, beliefs and doctrines: Salpointe is "pervasively religious in character"; its objective "is to nurture its students' ability to make moral choices and to instill a sense of Christian values"; "its distinguishing purpose [is] the inculcation in its students of the faith and morals of the Roman Catholic Church"; "all students are provided formal instruction in the Roman Catholic faith"; religious programs "are not separate from the academic and extracurricular programs, but are instead interwoven with them"; "[t]he two functions of secular education and advancement of religious values are inextricably intertwined throughout the operations of Salpointe"; and "Mass is celebrated at Salpointe each school day from 7:55 a.m. until 8:20 a.m." and students are encouraged to attend. J.A.90-92. In other words, *everything* that a state-paid sign language interpreter would be communicating to James at Salpointe would be part and parcel of the school's teaching, inculcation and propagation of the Roman Catholic faith.

Amici submit that such an expenditure of tax money and provision of assistance to the propagation of religion is plainly prohibited by this Court's prior decisions under the Establishment Clause. The Court need do no more than find, as it must, that the state aid involved here constitutes the use of tax money directly to assist in the teaching of religion in order to affirm the Ninth Circuit's decision.[5]

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[5] The fact that the state aid in this case would be used directly in the communication of religious teaching and beliefs clearly and unmistakably distinguishes such aid from the provision of police and fire protection, maintenance of streets and sidewalks, and other types of secular general benefits unrelated to the religious mission of a sectarian school. Thus, the United States' suggestion that affirmance of the (continued...)

B. Provision Of A State-Paid Sign Language Interpreter In A Sectarian School Would Have A Primary Effect Of Advancing Religion And Would Entail Excessive Entanglement Of The State With Religion

Relying principally on this Court's decisions in *Mueller* and *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, petitioners and their *amici* contend that the provision of a sign language interpreter to James Zobrest does not violate the Establishment Clause because it is merely the provision of a "general government benefit" to private individuals without reference to religion.[6] This contention depends upon a vastly oversimplified and inaccurate reading of this Court's Establishment Clause decisions, including *Mueller* and *Witters*. As explained below, the Ninth Circuit's decision is fully consistent with *Mueller* and *Witters* and is compelled by this Court's other prior decisions.

1. The Fact That Provision Of State Aid At A Sectarian School Depends Upon The Choice of Individual Parents To Send Their Child To Such A School Does Not Immunize The Aid From Establishment Clause Scrutiny

Petitioners and various *amici* contend that provision of a sign language interpreter to James Zobrest does not violate the Establishment Clause because it is "the sort

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[5] (...continued)
Ninth Circuit's decision would lead to "absurd results" with respect to such other types of aid is wrong. Brief of the United States at 18-19.

[6] *Amici* agree that both the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.*, and the provision of an interpreter to James Zobrest in this case have "a secular legislative purpose" and therefore satisfy the first prong of the *Lemon* test. *Lemon*, 403 U.S. at 612.

of attenuated financial benefit [that is] ultimately controlled by the private choices of individual parents." Petitioners' Brief at 15; Brief of United States at 18 (both citing *Mueller*, 463 U.S. at 400). But this Court has consistently rejected the notion that the mere fact that "aid was formally given to parents and not directly to the religious schools," *Grand Rapids*, 473 U.S. at 394, is sufficient to immunize the aid from Establishment Clause scrutiny. In *Meek v. Pittenger*, the Court held that "it would exalt form over substance if this distinction were found to justify a [different] result." 433 U.S. at 250. In *Mueller* itself, the Court reaffirmed its ruling in *Nyquist* that "'the fact that aid is disbursed to parents rather than to . . . schools'" is "'only one among many factors to be considered.'" *Mueller*, 463 U.S. at 399, *quoting Nyquist*, 413 U.S. at 781. Most recently, in *Witters*, the Court held that "[a]id may have that [impermissible] effect even though it takes the form of aid to students or parents." 474 U.S. at 487. *Cf. Grove City College v. Bell*, 465 U.S. 555, 565 (1984)(economic effect of direct aid to institutions and indirect aid paid through third person "often is indistinguishable").[7]

Moreover, *Mueller* and *Witters* dealt with types of state aid to sectarian education that are very different from the sign language interpreter at issue in this case. In *Mueller* and *Witters*, the state aid that was channeled

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[7] A rule that state aid is immune from Establishment Clause scrutiny merely because it is channeled through parents and students rather than provided directly to sectarian schools would create absurd and pernicious results. For example, such a rule might immunize from scrutiny a program whereby books selected by parents would be provided to students for use in sectarian schools, making it permissible for the state to provide Bibles and other religious books for use in those schools. Such a result would be anomalous indeed, in the face of the care this Court has properly taken in past decisions to ensure that states were not providing precisely such religious materials for use in sectarian schools. *E.g., Board of Education v. Allen*, 392 U.S. at 244-45.

through individual parents or students was purely financial, did not involve state participation in religious education, and created no visible link between the state and religious education. In neither instance were any tax dollars paid directly to any person who participated in the teaching or propagation of religious beliefs and no state employee participated in such religious activities.

Here, by contrast, tax dollars would be paid to a state-employed sign language interpreter who would actually participate in the communication of a pervasively religious education. That fact alone distinguishes this case from *Mueller* and *Witters*, and, as discussed above, is sufficient under this Court's prior decisions to render provision of a sign language interpreter impermissible under the Establishment Clause.

In addition, this case is very different from *Mueller* and *Witters* in several other respects. In *Mueller*, the Court concluded that, because the state financial aid was "available only as a result of decisions of individual parents, no 'imprimatur of state approval'" was present. 463 U.S. at 399, *quoting Widmar v. Vincent*, 454 U.S. 263, 274 (1981). Similarly, in *Witters*, the aid was purely financial and was available to the sectarian college only as a result of decisions by individual students, so that no "message of state endorsement of religion" could be inferred. 474 U.S. at 488-89. Indeed, in neither *Mueller* nor *Witters* would the fact of the state financial aid likely even be known to anyone other than the individual parents or students who chose to apply it toward a sectarian education, so that any "symbolic union" of church and state would be limited.[8] Here, where the state aid takes the

[8] In addition to involving a different type of aid than this case, *Witters* involved use of that aid at a college, not an elementary or secondary school. This Court has repeatedly held that Establishment Clause concerns are greater at the elementary and secondary school levels (continued...)

form of a state employee actually participating in religious classes and exercises on the premises of the sectarian school, the same cannot be said. To the contrary, the "symbolic union" of state and sectarian school that results from having a state employee participate in religious education is likely to create an "imprimatur of state approval," *see* pp.14-15, *infra*, and therefore to convey an impermissible "endorsement" of religious education. *See Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

Furthermore, this case presents entanglement problems that were not present in either *Mueller* or *Witters*. In *Mueller*, the Court found that provision of tax deductions for educational expenses did not "'excessively entangle' the State in religion" in violation of the third part of the *Lemon* test. 463 U.S. at 403. In *Witters*, the Court expressly did not address whether the state aid involved excessive entanglement because the state courts had not reached that question. 474 U.S. at 489 n.5. As explained more fully below, however, a sign language interpreter is an integral part of a child's educational experience at a sectarian school, who is not only responsible for translating the religious messages of the child's teachers, but who will spend the entire day by the child's side in the pervasively religious atmosphere of the school. *See* p.15, *infra*. Unlike tax deductions for parents or cash assistance to a college student, this participation by a state employee in religious education, even if it were otherwise permissible, would require such a degree of supervision to guard against impermissible inculcation of religious ideas or beliefs that it offends the Establishment Clause.

[8] (...continued)
than at the college level. *E.g., Lee v. Weisman*, 112 S.Ct. at 2658; *Tilton*, 403 U.S. at 685-87.

2. A Sign Language Interpreter Is Not Analogous To A Hearing Aid Or Other Forms Of Secular Assistance That Might Permissibly Be Provided To A Student Attending A Sectarian School

Petitioners and their *amici* assert that the effect of providing a sign language interpreter in a sectarian school is "secular" because "[h]is function is mechanical," Petitioners' Brief at 17, and that "an interpreter is analytically indistinguishable from a hearing aid," Brief of United States at 21. These assertions are incorrect and inconsistent with this Court's prior decisions for several reasons.

An interpreter is a person, not a machine, and is not indistinguishable, analytically or otherwise, from a hearing aid. A hearing aid does not appear in religious classes and at religious services as a representative of the state for all to see. Moreover, there is no risk that a hearing aid will communicate to a deaf child anything other than precisely what other persons are saying, and therefore no risk that a child using a hearing aid provided by the state would, because of the state aid, receive religious teaching in addition to or different from what every other child is receiving.

By contrast, a sign language interpreter will be present and visible, by James Zobrest's side, throughout each day of his religious education at Salpointe. In *Grand Rapids*, this Court held that state-paid instructors could not teach in sectarian schools in part because of the "crucial symbolic link between government and religion" that might appear "in the eyes of impressionable youngsters." 473 U.S. at 385. The Court so held even though the instructors in *Grand Rapids* would not have participated in any aspect of the religious program at the sectarian schools. Here, a state-paid sign language interpreter would actually participate in religious classes and services, thereby making the likelihood that students

would perceive a "symbolic link" between government and religion, and therefore a message of government endorsement of religious education, even greater than in *Grand Rapids*.[9]

Further, a sign language interpreter would spend the entire school day with James Zobrest at Salpointe. Unlike a hearing aid, the interpreter would have countless opportunities either intentionally or inadvertently to inculcate religious tenets or beliefs, whether they be the same as those expressed by James's teachers or different. The interpreter will be the student's only means of communicating "verbally" with his teachers and fellow students, and will be the only person with whom the student can communicate directly. The interpreter is "a member of the educational team, and is relied on by the teacher, the deaf student, and hearing peers, to relay information accurately and intelligibly both to and from the deaf student and others as needed." *See* "Educational Interpreting for Deaf Students: Report of the National Task Force on Educational Interpreting" (Rochester Institute of Technology 1989) at 7. Thus, like the auxiliary-services personnel in *Meek*, sign language interpreters would be "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." 421 U.S. at 371.

Petitioners and *amici* place great emphasis on the ethical guidelines that govern sign language interpreters.

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[9] Petitioners' and *amici*'s equation of a sign language interpreter with a hearing aid proves far too much. Under that equation, presumably it would be permissible for the state to provide sign language interpreters to interpret Sunday church services or similar religious exercises. Surely the presence of a state employee standing before a congregation translating a minister's sermon would offend any Establishment Clause test consistent with the fundamental purposes of that Clause.

But given the pervasively sectarian atmosphere of a parochial school and the fact that the interpreter will spend all day, every day, at the student's side in that school, one need "not question that the dedicated and professional [interpreters]," *Grand Rapids*, 473 U.S. at 387, will attempt to perform their jobs in good faith and comply with those guidelines in order to conclude that there is a substantial risk that they will subtly or overtly participate in inculcating religious ideas. *Id.* at 387-89; *Meek*, 421 U.S. at 369 ("the District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained").[10] Indeed, petitioners' and *amici*'s argument wholly ignores the fact that the sign language interpreter will not merely be translating what James Zobrest's teachers say in class, but will be interacting with him outside the classroom as well. Unlike a hearing aid, a sign language interpreter is both able and likely to respond to a signed question from his charge after class, such as "What did the teacher mean by . . . ," or "Could you tell me again what the teacher said about . . . ."

Because the role of a sign language interpreter is not merely "mechanical," provision of an interpreter, by contrast to a hearing aid, will require state supervision that entails excessive entanglement in violation of the

[10] Contrary to the assertions of petitioners and *amici*, a sign language interpreter who participates in religious classes and services is far more comparable, for Establishment Clause purposes, to an instructor of secular subjects or a counselor than to a diagnostician. *See Wolman*, 433 U.S. at 241-44. In *Wolman*, the Court upheld the provision of diagnostic services because they "have little or no educational content and are not closely associated with the educational mission of the non-public school," and because they have "only limited contact with the child." *Id.* at 244. By contrast, a sign language interpreter is an essential part of every educational communication to a deaf student, including the communication of religious tenets and doctrines, and has more contact with the child than anyone else in the school.

Lemon test. A sign language interpreter in a sectarian school will be called upon to interpret the religious ideas being expressed by a child's teacher's into a different language. *Amici* fully accept that most interpreters will attempt in good faith to comply with the ethical guidelines that require them to "render the message faithfully, always conveying the content and spirit of the speaker." J.A.72. But translating the content and spirit of a religious message into a different language, whether it be sign language or any other, is not a purely "mechanical" task. Even if the interpreter attempts to comply in good faith with the ethical guidelines, he or she may still communicate religious ideas subtly different from those being expressed verbally by a teacher. Because the interpreter is a state employee, the state will be required to monitor his performance to ensure that he is "conveying the content and spirit" of the teacher's religious ideas accurately. *See Sedalia School District v. Missouri Commission on Human Rights*, Case No. 45447 (Mo.Ct.App., W.Dist. 1992)(slip op.)(public school district justified in firing a high school sign language interpreter who violated guidelines). There is obviously no way for the state to do this without examining the religious messages that the sectarian school seeks to convey. Thus, even under the overly narrow approach to "entanglement" proposed by some *amici*, such monitoring of an interpreter's communication of religious messages would "touch on issues of religious significance" and violate the Establishment Clause. *See* Brief of Christian Legal Society at 25.

3. Advancing Religion Need Not Be The "Predominant" Effect Of State Aid In Order To Invalidate It Under The Establishment Clause

Petitioners assert that the "predominant" effect of the services of an interpreter for James at Salpointe would be "identical to the secular effects produced in public schools," and that the state aid in this case there-

fore does not have a "primary" effect that advances religion in violation of the second prong of the *Lemon* test. Petitioners' Brief at 10-12. First, as the Stipulation of Facts summarized above demonstrates, petitioners' assertion is inaccurate. The predominant effect of the interpreter's services would be to facilitate James's religious education because that is the predominant purpose and effect of an education at Salpointe. *See* p.9, *supra*.

Second, even if petitioners' factual assertion were accurate, the interpreter's services would still have a "primary effect" of advancing religion within the meaning of *Lemon*. Virtually all of the forms of state aid invalidated by this Court in the past, such as instructional equipment and materials, state-funded teachers of secular subjects, and grants for maintenance and repair of school buildings, could be said to have a "predominantly" secular effect on the same theory as petitioners advance here: that the effects of the aid would, for the most part, be the same as the effects of the same aid in a public school. The Court has nevertheless in each instance held that a "primary" effect of the aid was to advance religion in violation of the *Lemon* test. Indeed, in *Nyquist*, the Court expressly rejected the argument made by petitioners here: "Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion." 413 U.S. at 783 n.39.

Provision of a state-paid sign language interpreter to a student in a pervasively sectarian school such as Salpointe unquestionably has the "direct and immediate" effect of advancing religion by providing the means by which religious beliefs, ideas and doctrine will be communicated to a child.

4. The Court Must Examine The Effect Of State Aid In Sectarian Schools, Not Merely The "Overall" Effect Of The State's Program

In a related vein, petitioners and their *amici* suggest that the Ninth Circuit improperly focused on the "primary" effect of the state's provision of sign language interpreters in sectarian schools, rather than the "primary" effect of the entire program in all schools. Petitioners' Brief at 16; Brief of Christian Legal Society at 13. Petitioners and their *amici* apparently contend that any program that provides the same aid to all schools without regard to religious affiliation is "neutral" and therefore constitutional even if the aid is in fact being used to further religion in sectarian schools. This approach, if accepted by the Court, would immunize many forms of state aid to religion from Establishment Clause scrutiny and be inconsistent with most of this Court's prior decisions concerning state aid to sectarian schools.[11]

For example, a program whereby the state provided state-paid teachers to all schools, including sectarian schools, would obviously have a "primary" effect "overall" -- providing teachers for public school students -- that is secular. Moreover, under *amici*'s definition, the program would be "neutral" because the benefits would be provided to all schools without regard to religion. The result under either approach would be to allow state-employed instructors to teach in sectarian schools, in direct conflict with this Court's decisions in *Lemon*, *Grand Rapids* and *Aguilar*. Similarly, under either approach, a program whereby the state provided instructional materials, thera-

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[11] In *Bowen v. Kendrick*, Justice Kennedy indicated that, even where a statute provides benefits in a neutral fashion to religious and nonreligious applicants alike, the Court must still determine whether "the funds are in fact being used to further religion" in a pervasively sectarian institution. 487 U.S. at 624 (Kennedy, J., concurring).

peutic services, and grants for maintenance and repair to all schools, including sectarian schools, would be permissible, in direct conflict with this Court's decisions in *Nyquist* and *Meek*.[12]

II. A STATE'S REFUSAL TO PROVIDE A SIGN LANGUAGE INTERPRETER IN A SECTARIAN SCHOOL NEITHER BURDENS FREE EXERCISE RIGHTS NOR "DISCRIMINATES" AGAINST RELIGION

Contrary to the holding of the Court of Appeals and the assertions of petitioners and various *amici*, respondent's refusal to provide a sign language interpreter in a sectarian school does not burden petitioners' rights under the Free Exercise Clause, as that clause has been interpreted by this Court, and does not "discriminate" against religion. As this Court has emphasized, "'[t]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.'" *Bowen v. Roy*, 476 U.S. 693, 700 (1986), *quoting Sherbert v. Verner*, 374 U.S. 398, 412 (1963)(Douglas, J., concurring). Consistent with this reading of the Free Exercise Clause, the Court has never accepted the notion that the government's refusal to provide benefits for use in religious activities in sectarian schools burdens free exercise rights or violates the Equal Protection Clause. *Cf. Norwood v. Harrison*, 413 U.S. 455, 462 (1973).

To the contrary, the Court has consistently held that benefits to sectarian or church-affiliated schools are only permissible under the Establishment Clause if there exist sufficient safeguards to ensure that the benefits will *not*

[12] *Amici* Christian Legal Society, *et al.*, concede that the "government neutrality" approach they advocate would require the Court to overrule most of the Court's prior decisions concerning state aid to sectarian schools. Brief of Christian Legal Society at 15.

to be used for religious purposes. *See* pp.6-7, *supra*. In so holding, the Court has never even suggested that a state's explicit denial of otherwise available benefits for use in religious activities "discriminated" impermissibly against religion or burdened Free Exercise rights. *See, e.g., Mueller*, 463 U.S. at 403 (statute required state to disallow deductions for books used for religious purposes); *Lemon*, 403 U.S. at 608-10 (statute denied otherwise available salary supplements for any instructor teaching religion); *Tilton*, 403 U.S. at 675 (statute prohibited otherwise available grants to be used for any facility used for religious purposes); *Allen*, 392 U.S. at 244-45 (statute prohibited loan of religious textbooks).

Petitioners and their *amici* mistakenly rely upon cases in which this Court has held that denial of a purely secular and generally available benefit based upon an individual's religious beliefs or practices violates the Free Exercise Clause. *See, e.g., McDaniel v. Paty*, 435 U.S. 618 (1978)(disqualification of minister from serving as delegate to constitutional convention); *Sherbert v. Verner*, 374 U.S. 398 (denial of unemployment benefits because individual's religion required her not to work on Saturday). In none of these cases would the benefit sought by the individual have been used by that individual in the practice of his or her religion, and certainly the cases did not involve the direct participation of a government employee in religious practices or teaching. The cases are therefore different from this case in two critical respects.

First, because the cases did not involve a demand that the state actually expend tax dollars to provide assistance to an individual in the practice of his religion, they did not raise the fundamental Establishment Clause problem that exists here. *McDaniel*, 435 U.S. at 628-29; *Sherbert*, 374 U.S. at 409-10. Thus, the state's compelling interest in avoiding a violation of the Establishment Clause could not justify any burden on free exercise rights in those cases.

Second, the benefits sought by the individual plaintiffs in those cases were indistinguishable from the benefits provided to other individuals: in *McDaniel*, the right to serve as a delegate; in *Sherbert*, the right to unemployment compensation. Here, by contrast, the benefit that petitioners seek is *different* from the benefit available to others. James Zobrest's parents want the state to provide him with assistance, in the form of a sign language interpreter, in obtaining a *religious* education. That benefit is not available to those parents, including parents of profoundly deaf children, who do not choose or whose religions do not require them to seek an education for their child at a sectarian school. Those parents must provide whatever special assistance their child needs to obtain a religious education at their own expense. Thus, were the state to provide a sign language interpreter to students in sectarian schools, it would in fact discriminate against other students on the basis of religion and impermissibly create an incentive for parents to send their children to sectarian schools rather than nonsectarian schools, in violation of both the Free Exercise Clause and the Establishment Clause. Far from "singl[ing] out students who attend religious schools for a special disability," Brief of Christian Legal Society at 8, the state has merely declined to provide those students with a special benefit based upon their religious beliefs and practices.[13]

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[13] *Amici* attempt to distinguish between governmental policies or actions that "create[] an *incentive* to engage in a religious practice" -- which *amici* say are impermissible -- and those in which "obstacles to religious exercise are lifted." Brief of Christian Legal Society at 20. Here, as explained above, we submit that provision of a sign language interpreter in a sectarian school does not merely "lift an obstacle" to religious exercise, but creates an "incentive" to send children to sectarian schools by providing assistance to religious teaching in those schools. But we also submit that *amici*'s semantic dichotomy is not helpful to reaching the correct result in most cases. For example, does it create an "incentive" for individuals to adopt a religion that precludes work on Saturdays, if they can thereby get unemployment (continued...)

This analysis demonstrates that respondent's failure to provide a sign language interpreter in a sectarian school does not burden petitioners' free exercise rights for the same reason that doing so would violate the Establishment Clause: in providing an interpreter in a sectarian school, the state would be providing direct assistance in the teaching and propagation of religious beliefs and ideas. Thus, properly understood in light of this Court's prior decisions, this case provides an excellent illustration that "the two Clauses are harmonious and mutually reinforcing provisions with the central and unifying purpose of protecting the freedom of religion." Brief of Christian Legal Society at 1. No reexamination of the Court's interpretation of the Religion Clauses is

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[13] (...continued)
compensation they could not otherwise obtain, or does it merely "lift an obstacle"? *See Sherbert*, 374 U.S. 398. Similarly, does it create an "incentive" to religious belief and exercise, or merely "lift an obstacle," for the government to exempt persons with certain beliefs from military conscription? *See Gillette v. United States*, 401 U.S. 437, 454-60 (1971). This is but one illustration of the fact that the relationships between government and religion, and the proper application of the Religion Clauses to those relationships, are too complex to be governed by the purportedly "simple" and "neutral" dichotomies proposed by *amici*. *See also* n.12, *infra*.

necessary either to reach the proper result in this case or to fulfill those Clauses' mutual and harmonious purpose.[14]

[14] *Amici* Christian Legal Society, *et al.*, set up a false "conflict" between this Court's interpretations of the Free Exercise Clause and the Establishment Clause in order to persuade the Court that "reexamination" is essential. Thus, *amici* argue that "[t]o say a single governmental act . . . is both a burden on the free exercise of religion *and* necessary to avoid an advancement of religion suggests that the court is using inconsistent understandings of 'advancement' and 'burden.'" Brief of Christian Legal Society at 6. We have demonstrated above that the state's refusal to provide a sign language interpreter in a sectarian school does not burden free exercise rights, so that no such circumstance exists in this case in any event.

However, we also disagree with *amici*'s argument that, under a proper interpretation of the Religion Clauses, a governmental act can never be both a burden on free exercise rights and necessary to avoid an advancement of religion. If an instructor in a public elementary school believed that his religion required him to proselytize his students, and he were fired or disciplined for doing so, there would be a "burden" on his free exercise rights because he would have been penalized based solely upon his religious beliefs and practices. *See Bishop v. Aronoff*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, __ U.S. _, 112 S.Ct. 3026 (1992); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3025 (1992). However, a public school teacher's proselytizing of his students unquestionably constitutes an "advancement" of religion by the state that is prohibited by the Establishment Clause. We submit that, confronted with such a situation, this Court would undoubtedly hold that the "burden" on the teacher's free exercise rights was justified by the state's compelling state interest in avoiding such advancement of religion by its teachers.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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